United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2586

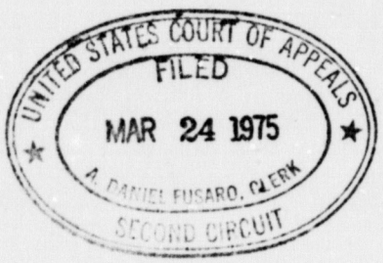
To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. WILLIAM PUTMON, Appellant, -against- ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, Appellee.	Docket No. 75-2586

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
DENYING A WRIT OF HABEAS CORPUS



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QUESTIONS PRESENTED

1. Whether appellant's entry of a guilty plea in 1971 and the conviction based thereon is invalid because it was entered at a time when there was substantial doubt about appellant's competence and there was no contemporaneous determination of that issue.

2. Whether the District Court applied the correct standard to determine appellant's competence.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court (The Honorable Harold P. Burke) entered on November 18, 1974, denying after a hearing appellant Peterson's petition for a writ of habeas corpus.

On February 13, 1975, this Court granted a certificate of probable cause and leave to appeal in forma pauperis, and assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

On September 30, 1970, appellant was arraigned on Indictment No. 503 before Judge Ogden of the County Court of the State of New York (Monroe County). The indictment charged appellant with burglary in the third degree and petit larceny. For reasons not apparent in the record, a psychiatric examination of appellant was conducted five months after the arraignment by Dr. Stephen Dvorin and Dr. David Mactye on May 18 and 19, 1971. Dr. Dvorin prepared a report on appellant's ability to understand the charges and participate in his defense.* He reported:

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*This report, hereinafter called the "Dvorin report," was dated May 20, 1971, and is "D" to appellant's separate appendix. The report is addressed to Judge of County Court, Hall of Justice, Rochester, New York.

> This man presents himself as a confused and bewildered person who lacks clear understanding of the charges against him in the current court proceedings and the possible consequences of his alleged behavior. He is unable to sufficiently concentrate on the task at hand so as to be able to assist in his defense and as he is directly questioned he becomes increasingly anxious, confused and pressured. My conclusion, therefore, is that he is not competent enough to proceed in his trial because he cannot understand the charges against him and he is not able to assist in his defense.

Additionally, Dr. Dvorin stated, in part:

> [Appellant] has been shown through psychological testing to be in the mentally defective range. On two occasions that I saw him in jail he gave widely differing stories about the reasons for his arrest. He was unable to clearly state why he had been brought to jail, and he did not know what the charges against him were.... His memory for recent and past events was impaired; he was able to do simple calculations; he was not able to concentrate well on the task at hand; his intellectual capacities seem to be consistent with those reported in psychological testing.
>
> The Dvorin report, Appendix "D", at 1.

As a result of the report, on May 25 appellant was transferred to Rochester State Hospital for further study, and was admitted to Unit B, a minimum security section, to determine his competence to stand trial on the burglary charge. On May 27, 1971, appellant was transferred to the maximum security ward, 4 East, designed for court cases.

On June 25, 1971, a second indictment, charging rape and robbery, was filed against appellant (Indictment No. 347).

While he was in the maximum security ward, appellant was

examined by Dr. Iapaolo, who reported that appellant started to feel tense and to argue. (Report of Dr. Felice Iapaolo, dated June 21, 1971, hereinafter called the "Iapolo report," annexed as "E" to appellant's separate appendix). Dr. Iapaolo filed a written report which stated, in substance, that appellant was aware of the nature of the charges (referring to the burglary indictment) against him, could understand the proceedings, and could aid in his defense. Dr. Iapaolo was totally unaware of the Dvorin report which had been furnished to the court approximately one month earlier (25*). Moreover, he was unaware that rape charges had been filed against appellant (27).

In fact, both Dr. Dvorin and Dr. Iapolo examined appellant only on his ability to understand the burglary and larceny charges (Dvorin report, Appendix "D" at 1) (25).

On June 25, 1971, appellant was arraigned before Judge Conway of County Court of the State of New York (Monroe County) on the rape charges, and appellant pleaded not guilty. At some point, not clear from the record, the court was advised that appellant was seeing things and threatening suicide.

After these events, Dr. Donald Ferris and Dr. David Barry examined appellant (The "Ferris report," annexed as "A" to appellant's petition and as "F" to appellant's separate appendix) solely to determine his suicidal intent. The report stated that

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*Numerals in parentheses refer to pages of the transcript of the District Court proceeding.

guards reported that appellant talked to imaginary persons; that he asked the guards for a towel to complete a rope with which to hang himself; that he stated he had conversations with Shorty, a short creature with long, pointed ears, and that trees with snakes around them were laughing at him; and that he reported that bats ate his brains up and laughed at him, saying, "The evilness of the mind is destroying you." The doctors concluded that appellant's behavior was a manipulative attempt to get himself out of jail, but, backtracking, Dr. Ferris stated that appellant could be suffering from paranoid schizophrenia.

On August 20, 1971, appellant was tried before Judge Ogden for burglary, and was found guilty. On October 19, 1971, a guilty plea to the charge of attempted rape in the first degree was entered before Judge Conway in full satisfaction of the multiple charges contained in Indictment No. 347. The colloquy between Judge Conway and appellant is peculiarly devoid of substantiating facts relevant to the charge to which appellant pleaded, and is indicative of appellant's lack of understanding of the charges:

> THE COURT: After you went inside the house, what did you do?
>
> DEFENDANT PUTMON: Well, I looked around to pick up a watch and radio.
>
> THE COURT: What did you do with the lady?
>
> DEFENDANT PUTMON: She was outside, and then she came inside.

THE COURT: And then what happened?

DEFENDANT PUTMON: We started talking.

THE COURT: And, well, go ahead. Tell me what happened from then on?

DEFENDANT PUTMON: We started talking and then we went upstairs in the bedroom. I believe we had a relationship upstairs. Then I left.

Minutes of the Guilty Plea of William Putmon, dated October 19, 1971, at 5-6, annexed as "B" to appellant's appendix.

Judge Conway indicated that he had access to the previous multiple psychiatric evaluations, but, without a hearing, found appellant competent. Minutes of Guilty Plea, Appendix "B" at 6.* On October 20, 1971, Judge Conway sentenced appellant to a minimum prison term of four years and a maximum of twelve years. On the same day, Judge Ogden imposed a sentence of one to four years on the burglary conviction, the sentence to run concurrently with that imposed by Judge Conway. No notice of appeal was filed on either conviction.

On January 3, 1973, appellant filed a petition for writ of error coram nobis to vacate the judgment of conviction rendered on October 20, 1971 (conviction for attempted rape), on the ground that the judgment was based upon appellant's plea of guilty entered at a time when he was incompetent. This application was denied by the Supreme Court, Monroe County, on April

*Although the judge did not enumerate, presumably these evaluations were the Dvorin, the Iapaolo, and the Ferris reports.

5, 1973. On May 16, 1973, the Appellate Division, Fourth Department, denied permission to appeal, and leave to appeal to the Court of Appeals was denied on July 13, 1973.

Prior Proceedings in Federal Court

Appellant then filed a petition dated July 17, 1973, for a writ of habeas corpus in the United States District Court for the Western District of New York, seeking vacature of the state judgment of October 19, 1971. By order dated December 12, 1973, Judge Burke denied appellant's application without a hearing,* and denied a certificate of probable cause. Appellant then filed a pro se motion in this Court for a certificate of probable cause and for leave to appeal in forma pauperis. This motion was granted by order dated June 21, 1974 (Second Circuit order, annexed as "H" to appellant's appendix) to the extent of remanding the case for a hearing to determine appellant's competence at the time of his guilty plea. United States ex rel. William Putmon v. Henderson, filed June 21, 1974. The Second Circuit did not address itself to the propriety of holding a hearing three years after appellant's guilty plea was entered.

The hearing before Judge Burke was held on September 9, 1974. Dr. Dvorin and Dr. Iapaolo testified. Dr. Dvorin referred to the report he had prepared on appellant's competence, dated

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*Judge Burke's order is reproduced as "G" to appellant's appendix.

May 20, 1971 (7). He then simply regurgitated the conclusion drawn in that report (8), and did not testify about the facts upon which that conclusion was based. Likewise, Dr. Iapaolo simply reiterated the findings of his report on appellant's competence dated June 21, 1971 (20, 21), and explained the general procedures used during June for the processing of court patients (22-24). Dr. Iapolo could not relate the specifics of appellant's examination, and did not testify about the facts upon which his report was based (22, 24).

Upon the testimony of Dr. Dvorin and Dr. Iapolo and the proceedings to date, Judge Burke found, by order dated November 18, 1974,* that appellant was capable of understanding the charges against him and of understanding the nature and consequence of his guilty plea entered almost three years previously. This order of November 18, 1974, is the order from which this appeal is now taken.

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*Judge Burke's order of November 18, 1974, is reproduced as "C" of appellant's appendix.

ARGUMENT

Point I

APPELLANT'S PLEA OF GUILTY WAS INVALID BECAUSE IT WAS ENTERED AT A TIME WHEN THERE WAS SUBSTANTIAL EVIDENCE TO INDICATE THAT HE WAS INCOMPETENT, AND THERE WAS NO CONTEMPORANEOUS DETERMINATION OF THAT ISSUE.

A. The hearing held by the District Court in September of 1974 did not cure the error in the state court's failure to hold a competency hearing in 1971.

Appellant pleaded guilty to the crime of attempted rape on October 19, 1971. Five months prior to the entry of the guilty plea, the Dvorin report concluded that appellant was not competent to stand trial for burglary because he could not understand the charges against him and could not assist in his defense. As a result of the Dvorin report, appellant was placed in a state hospital, and a second report was ordered.

A month later a second report, the Iapaolo report, was furnished to the court. That report stated that appellant was aware of the nature of the burglary charge then pending against him. Neither report considered the possibility that appellant had committed a rape,* certainly a critical factor in determining

*The Dvorin report was filed before the rape charges were filed; the Iapaolo report was prepared without an awareness that such charges had been filed.

appellant's emotional health. Moreover, both reports were based on examinations which questioned appellant about his understanding of the burglary, and not the rape, charge. Additionally, since Dr. Iapaolo was unaware of the Dvorin report (25), Dr. Iapaolo could not have considered the facts contained in that report as part of the necessary input required to render a true and accurate statement of appellant's competence. Specifically, Dr. Iapaolo was unaware of psychological testing indicating that appellant was in the mentally defective range and that he was hallucinating.

Notwithstanding these circumstances, the conflict concerning appellant's competence, and the possibility that appellant's mental status was changing from month to month, the state court held no hearing prior to acceptance of the plea. It was not until three years later, and pursuant to this Court's order, that a hearing was finally held in the District Court.

In Pate v. Robinson, 383 U.S. 375, 387 (1966), the Supreme Court held insufficient a hearing on the question of competency to stand trial ordered years after the critical dates in question. The Court emphasized the need for determination of the issue contemporaneously with the commencement of trial. Drope v. Missouri, 43 U.S.L.W. 4248 (Sup. Ct. February 19, 1975), strongly emphasized the difficulties in making an accurate determination of competency after a lapse of time. In Pate, supra, the Court also noted that expert witnesses would be able to testify only from information contained in the printed records or in their own reports, without independent recollection. See also Drusky v. United States, 362 U.S. 402 (1960); Drope v. Missouri, supra, 43 U.S.L.W. at 4254.

The facts of this case fall within the rule of Pate v. Robinson, supra, and require that appellant be allowed to withdraw his plea of guilty. In this case, the reasons for justifying this remedy are even more compelling than in Pate, for here it was impossible to reconstruct appellant's competence to enter a guilty plea to the attempted rape charges. No psychiatrist who examined appellant in 1971 addressed the issue of appellant's understanding of the pending rape charge. Moreover, not even a concurrent medical report with respect to appellant's competence at the critical time in 1971 was made. The last psychiatric examination of appellant's competence was based on observations which occurred more than four months prior to the guilty plea. This is insufficient in light of the fact that appellant's mental status was apparently changing from month to month. The District Court could not, three years later, reconstruct appellant's competence to enter a guilty plea in 1971.

The minutes of the District Court hearing support this conclusion and highlight the need for the contemporaneous hearing required under Pate. At the District Court hearing, Dr. Dvorin and Dr. Iapaolo simply reiterated the conclusions contained in their earlier reports. They did not relate or discuss the facts upon which their conclusions were based. They were able only to discuss the procedures used in making a diagnosis. These procedures are irrelevant to the facts which were relied upon to reach that diagnosis.

A concurrent determination of competency to understand the

nature of the consequences of the guilty plea is required. Pate v. Robinson, supra, 383 U.S. at 387. The facts of this case make it impossible to reconstruct appellant's competency three years after the relevant date. Drope v. Missouri, supra, 43 U.S.L.W. at 4254.

> The state trial court was not permitted to weigh that evidence [indicating a "reasonable doubt" about competency] in determining whether to hold the required competency hearing. In reviewing the claim of Pate error, the district court is not permitted to weigh the evidence before the state court that the state court itself was forbidden to weigh.
>
> de Kaplany v. McCarthy, 503 F.2d 1041, 1042-1043 (9th Cir. 1974).

B. A hearing was required before Judge Conway in 1971 to determine appellant's competence to enter a guilty plea.

It is unchallenged that the conviction of an accused while he is incompetent violates due process. Bishop v. United States, 350 U.S. 961 (1956). As a consequence, a hearing by the court sua sponte is required where evidence is before the trial judge which would raise substantial doubt as to a defendant's competency. Pate v. Robinson, supra, 383 U.S. 375; see also United States ex rel. Curtis v. Zelker, 466 F.2d 1092, 1099 (2d Cir. 1972). This Court has stated that a hearing is necessary "where the evidence before the court provides a 'reasonable ground' for believing that" an individual is incompetent to stand trial.

United States ex rel. Roth v. Zelker, 455 F.2d 1105 (2d Cir. 1972).*

> The function of the trial court in applying Pate's substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? It [sic] sole function is to decide whether there is any *evidence* which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court, sua sponte, must order an evidentiary hearing on the competency issue. It is only after the evidentiary hearing, applying the usual rules appropriate to trial, that the court decides the issue of competency of the defendant to stand trial.
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> Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972).

See also Tillary v. Eyman, 492 F.2d 1056 (9th Cir. 1974).

In the instant case, Judge Conway accepted appellant's plea, stating that he "had access to the previous multiple psychiatric evaluations of the defendant." Minutes of the Guilty Plea, Appendix "B", at 5. Thus, he was aware of the Dvorin and

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*The applicable provisions of the New York Criminal Procedure Law ("C.P.L.") §730.30 comply with the requirements of Curtis, supra, and Pate, supra. The C.P.L. provides that a hearing must be held to determine capacity if the relevant psychiatric examiners are not unanimous in their opinion concerning whether a defendant is or is not an incapacitated person. The conflict between the opinions rendered in the Dvorin and the Iapaolo reports required that Judge Conway hold a hearing since "the psychiatric examiners [were] not unanimous in their opinion as to whether the defendant [was] or [was] not an incapacitated person...." N.Y.C.P.L., §730.30. See also People v. Boundy, 10 N.Y.2d 518, 225 N.Y.S.2d 207 (1962); People v. Blando, 23 A.D.2d 761, 258 N.Y.S.2d 548 (2d Dept. 1965); People v. Jones, 12 N.Y.2d 1024, 239 N.Y.S. 348 (1963); People v. Sprague, 11 N.Y.2d 951, 228 N.Y.S.2d 832 (1962); cf. People ex rel. Malone v. Johnston, 37 A.D.2d 545, 323 N.Y.S.2d 246 (2d Dept. 1971).

Iapaolo reports rendered for the express purpose of determining appellant's competence to stand trial on the burglary charge. Likewise, Judge Conway was aware that the two reports directly contradicted each other concerning their respective opinions of appellant's competence to stand trial on that charge. Further, Judge Conway must have had knowledge of the Ferris report which asserted that appellant could be a paranoid schizophrenic. These conflicting reports and the information known to Judge Conway on the date of appellant's plea mandated that a hearing be held at that time to determine appellant's ability to enter a guilty plea. Indeed, it has been stated that the need for a judicial determination of competence is obvious and great when there has been a recent psychiatric determination of incompetence. See, e.g., Gunther v. United States, 215 F.2d 493, 497 (D.C. Cir. 1954). Since no hearing was held, and since substantial doubt existed as to appellant's competence, appellant's guilty plea must be vacated. Pate v. Robinson, supra, 383 U.S. at 387; de Kaplany v. McCarthy, supra, 503 F.2d at 1043.*

Additionally, the Iapaolo report that appellant was competent was not, of itself, sufficient to justify the denial of a hearing on the question of incompetence, and should not have been used to determine appellant's competence to plead guilty to the rape charge lodged against him. As discussed earlier,

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*Since substantial doubt existed about appellant's competence, and since the District Court could not cure the failure to hold a hearing in 1971, the District Court's hearing is invalid and its findings should not be upheld.

Dr. Iapaolo was not aware of two critical factors relevant to a determination of appellant's competence: the facts in the Dvorin report, and the possibility that appellant had committed a rape.

The Supreme Court, in Drope v. Missouri, supra, 43 U.S.L.W. at 4253, has recently stated:

> The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient.

The conflicting psychiatric reports in this case required a hearing in state court in 1971.

Point II

THE STANDAPD APPLIED BY THF DISTRICT COURT IN DETERMINING APPELLANT'S COMPETENCE WAS INCORRECT.

Entering a plea of guilty to a state criminal charge results in waivers of a number of federal constitutional rights. The Supreme Court enumerated those rights in Boykin v. Alabama, 395 U.S. 238, 243 (1969), holding:

> First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Malloy v. Hogan, 378 U.S. 1. Second, is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145. Third, is the right to confront one's accusers. Pointer v. Texas, 380 U.S. 400.

Obviously, these rights are not waived if an accused proceeds to trial.

In light of these considerations, and analogyzing from Westbrook v. Arizona, 384 U.S. 150 (1966), the Ninth Circuit has held that an accused must have a higher level of competence to enter a guilty plea than to stand trial. Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973); de Kaplany v. McCarthy, supra, 503 F.2d at 1042. A higher level of competence is needed because the multiple rights waived in entering a plea of guilty must be understood by an accused in the abstract. Only this kind of understanding will permit the intelligent and knowing waiver that is required. Johnson v. Zerbst, 304 U.S. 458 (1938). This differs from the understanding necessary to undergo trial

in which no waiver occurs and where the guiding hand of counsel is present to aid the accused. See Gideon v. Wainwright, 372 U.S. 335 (1963).

As a result, where the entry of a guilty plea is at issue, any psychiatric report or hearing utilized to determine an accused's competence must be directed to the defendant's understanding of the alternatives available to him and to his understanding of the nature of the consequences of his plea. Seiling v. Eyman, supra, 478 F.2d at 215.

In this case, the District Court's determination of competence was based upon the testimony of Dr. Dvorin and Dr. Iapaolo, who testified about their 1971 reports. In turn, these psychiatric reports examined appellant's understanding of the nature of the charges against him and his ability to assist in his defense. This standard is clearly insufficient to determine appellant's competence to enter a plea of guilty, de Kaplany v. McCarthy, supra, 503 F.2d at 1042, and the District Court's findings cannot be upheld.

In the context of deciding the analogous issue of voluntariness of a confession, this Court has ruled that once a defendant's mental condition is a factor to be examined, the trial court must hold a hearing and must decide "whether the accused was at the time he confessed so mentally ill that he was unable, with intelligence, knowledge and understanding, to relinquish or abandon a known right or privilege which was his." United States v. Silva, 418 F.2d 328 (2d Cir. 1969). Boykin, supra, 395 U.S. 238,

emphasizes the multiple rights which a guilty plea entails. A standard similar to that employed by Silva or by Seiling, supra, is required in the instant case. The District Court's findings are clearly erroneous.

CONCLUSION

For the foregoing reasons, appellant's application for a writ of habeas corpus should be granted and appellant should be allowed to withdraw his guilty plea.

Respectfully submitted,

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March 24, 1975

CERTIFICATE OF SERVICE

March 24, 1975

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Jonathan Hulbert